No. 724.

In the Supreme Court of the United States

October Term, 1947.

BEN E. GOODWIN AND M. R. GOODWIN, doing business as BEN E. GOODWIN COMPANY, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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No. ———.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Frank M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Ben E. Goodwin and M. R. Goodwin, doing business as Ben E. Goodwin Company, pray that a Writ of Certiorari issue to review the judgment of the orders of the United States Court of Appeals for the Eighth Judicial Circuit, entered on the 16th day of January, 1948, and respectfully show to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Chester Bowles, then Price Administrator, Office of Price Administration, instituted this cause in the District

Court of the United States for the Western Division of the Western District of Missouri upon the 6th day of December, 1945, by the filing of a complaint against petitioners praying for a judgment of $57,031.87 because of alleged sales of wrist watches for sums in excess of the allowable maximum prices (R. 1-2).

The complaint alleged that "in the judgment of the Price Administrator, the defendants herein have engaged in acts and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942, and Amendments thereto, hereinafter called the 'Act,' in that said defendants have violated Maximum Import Price Regulation, issued pursuant to 2(a) of the Act and therefore pursuant to Section 205 (a) of the Act, the Administrator brings this action to enforce compliance with Section 4(a) of the Act and with said Regulation and Amendments thereto." (R. 1.)

On the 23rd day of August, 1946, Paul A. Porter, Price Administrator of the Office of Price Administration, filed his motion in said District Court, noticing for hearing on the 28th day of August, 1946, his motion to be substituted as plaintiff in said action on the grounds that he had succeeded Chester Bowles as such Price Administrator on the 19th day of March, 1946 (R. 4-5). Subsequently Paul A. Porter admitted that such date of succession was erroneous and that he had actually taken office on the 26th day of February, 1946 (R. 48).

On the 9th day of September, 1946, said petitioners (defendants therein) filed in said District Court their plea in abatement and motion to dismiss said action on the grounds that same had abated beyond revival because of failure to observe Section 780, 28 U. S. C. A., and Rule 25(d) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), with respect to substitu-

tion of a successor in office and that the time within which revival could be made had expired (R. 42-43-44-45).

Paul A. Porter's said motion for substitution was overruled and defendants' motion for abatement and dismissal were sustained by said District Court on the first day of November, 1946 (R. 52-53).

On the same day the said District Court dismissed said action on the grounds that movant had not made a showing of his right of substitution within the period of six months as prescribed by said statute and said Rule of Civil Procedure (R. 52-53).

On the 20th day of January, 1947, one Philip B. Fleming, claiming to be the successor in office to Paul Porter as aforesaid, filed his motion in said District Court to be substituted as plaintiff in said action in the place of Paul A. Porter (R. 53-54).

That motion of Philip B. Fleming to substitute him as plaintiff was duly argued before the District Judge on the 24th day of January, 1947, after which the District Court reserved ruling thereon (Supp. R. 7).

During the pendency of the motion and before it was passed upon by the District Court, the said Philip B. Fleming as Temporary Controls Administrator filed his notice of appeal from the judgment and order overruling Porter's motion for substitution and sustaining petitioners' motion for an abatement and dismissal of the action (R. 55-56.)

On June 17, 1947, the United States Attorney for the Western District of Missouri appeared in the United States Court of Appeals for the Eighth Circuit, representing the United States, and by motion prayed for an order substituting the United States as appellant in the place of Fleming, who had never been a party to the action (8th Cir. R. 5-6).

Petitioners filed in said Circuit Court their motion to dismiss the appeal (8th Cir. R. 6, *et seq.*) and objections to the motion to substitute United States of America as appellant (8th Cir. R. 11, *et seq.*), in which they contended that the appeal was improperly taken without authority of law by Fleming, a stranger to the record and who had no rights in the action and that the United States of America also had no rights in the action and that the action had abated beyond revival.

Such motion to substitute the United States, petitioners' objections thereto, and petitioners' motion to dismiss, were presented on June 23, 1947, at which time the Circuit Court passed all such matters for consideration at the time of the hearing on the merits (8th Cir. R. 16-17).

The opinion of the United States Court of Appeals for the Eighth Circuit, filed on the 16th day of January, 1948, vacated the orders of the District Court dismissing said cause and sustaining petitioners' motion for abatement and to dismiss. The opinion also granted the motion of the United States to be substituted as appellant and directed the District Court to hear the case (8th Cir. R. 22, *et seq.*).

That opinion held that, although both Porter and Fleming had assumed that compliance with Rule 25(d) was required by applying for substitution under its terms, that the action was unaffected by their separation from office for the alleged reason that the only actions coming within the purview of such rule were those personal in character when brought by or against a public officer. The opinion further held that since that action did not come within such classification it did not abate and therefore the District Court obviously erred in dismissing it, "even though it cannot justly be criticized for doing so."

That opinion held that, since the action was at all times a controversy between the Government and petitioners,

the Government should be substituted in accordance with its motion so that the judgment finally entered would bind the right parties, said to be the only purpose of substituting in such cases.

On the 16th day of January, 1948, in said Eighth Circuit Court of Appeals, an order was entered by said Court sustaining the motion of the United States of America to be substituted and denying petitioners' motion to dismiss (8th Cir. R. 29).

On the 16th day of January, 1948, in said Eighth Circuit Court of Appeals, an order was entered by said Circuit Court vacating the said order of said District Court appealed from and remanding the said cause to said District Court with directions to try same on the merits (8th Cir. R. 30).

On the 30th day of January, 1948, petitioners filed their motion for rehearing (8th Cir. R. 31), which was denied on the 17th day of February, 1948 (8th Cir. R. 39).

B.

Reasons Relied on For Allowance of the Writ.

The prime question presented essentially involves the meaning interpretation, scope and effect of Rule 25(d), Federal Rules of Civil Procedure, Title 28 U. S. C. A. following Section 723(c) and Title 28 U. S. C. A., Section 780 (43 Stat. 941) and Supreme Court Rule 19(4), all dealing with substitution procedure.

Subsidiary to the above questions but nevertheless involved herein is the authority and power of said Circuit Court to order the United States of America to be substituted in that Court as party plaintiff and to take jurisdiction of the pretended appeal by Philip B. Fleming, who had never been a party to said cause.

The Statute, Section 780, Title 28, U. S. C. A., provides that upon the resignation of an officer of the United States during the pendency of an action brought by him, that his successor may be substituted upon a certain showing, Supreme Court Rule 19(4) states that this statute covers the matter of abatement and substitution where a public officer, by whom a suit has been brought, ceases to hold office while the suit is pending in the Federal Court, either of the first instance or appellate. Rule 25(d) of the Federal Rules of Civil Procedure does not differ materially from the earlier statute.

When the Eighth Circuit held that the substitution procedure of the statute and the Rules does not apply in cases like the instant action, it nullified a simple, orderly device for handling cases where public officers cease to hold office during the pendency of a suit by or against them. If this opinion is permitted to stand, it will restore the confusion and inconvenience existing prior to the enactment of the statute and those rules. And this is an era when the participation by public officers as litigants is not diminishing.

When the Eighth Circuit took jurisdiction of the purported appeal by Fleming, Administrator, and ordered the substitution of the United States of America as the party plaintiff, it departed from the accepted and usual course in judicial procedure.

In so holding,

(a) The Eighth Circuit Court of Appeals has rendered a decision in conflict with that of the Tenth Circuit Court of Appeals on the same matter, in the following case: *State of Oklahoma ex rel. McVey, County Attorney*, v. *Magnolia Petroleum Co.*, 114 F. (2d) 111, 115.

(b) The Eighth Circuit Court of Appeals has decided a Federal question in a way probably in conflict with

applicable decisions of this Court—that is, with the decision in *Fix, Collector,* v. *Philadelphia Barge Company,* 290 U. S. 530, 78 L. Ed. 481, 54 S. Ct. 270, 271, and *Fleming* v. *Mohawk Wrecking and Lumber Company,* 331 U. S. 111, 67 S. Ct. 1129.

(c) The Eighth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that the Eighth Circuit has taken jurisdiction of an appeal by a party not of record, and has thereafter allowed substitution as party plaintiff of still another party while such pretended appeal was pending in said Circuit Court of Appeals, which question was not presented to or passed on by the District Court; that the Eighth Circuit has substituted a confusing, illogical rule of its own creation in place of and in conflict with Rule 25(d) of the Federal Rules of Civil Procedure, Sec. 780, Title 28, U. S. C. A. (43 Stat. 941), and Rule 19(4) of this Court.

(d) The Eighth Circuit Court of Appeals has decided an important question of federal law which should be settled by the Supreme Court so that an authoritative guide may be set up for many cases now pending in the courts of the United States in which substitution questions are involved similar to those in the instant case, and in which contrary decisions are being made.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court for its determination, on a day certain to be therein named, a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals, in the case

entitled and numbered on its docket 13511, Civil, United States of America, appellant, vs. Ben E. Goodwin and M. R. Goodwin, doing business as Ben E. Goodwin Company, appellees, and that the judgment and orders of the Eighth Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and in this your petitioners will ever pray.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERITORARI.

I.

Opinions Below.

The District Court opinion (R. 61) was filed upon the 1st day of November, 1946, and is reported in 68 Fed. Supp. 949. The opinion of the Circuit Court of Appeals (8th Cir., R. 22) was filed the 16th day of January, 1948, and is reported in 165 F. (2d) ~~224-230.~~ 334-338

II.

Jurisdiction.

The judgment and order below was entered on January 16, 1948 (8th Cir. R. 29-30), vacating the judgment and orders of the District Court sustaining a motion in abatement and dismissing the action (R. 52-53); petition for rehearing in the Circuit Court of Appeals was denied upon the 17th day of February, 1948 (8th Cir. R. 39).

The jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, and Rule 38 of this Court.

III.

Questions Presented.

This cause involves the meaning, interpretation and effect of Rule 25(d), Federal Rules of Civil Procedure, Title 28, U. S. C. A., following Sec. 723(c), and Title 28, U. S. C. A., Sec. 780 (43 Stat. 941), and Supreme Court Rule 19(4), all of which concern substitution procedure

in the event a public officer ceases to hold office during the pendency of a suit instituted by or against him. Otherwise more specifically stated, the questions addressed to this Court are these:

Does an action brought by the Price Administrator of the Office of Price Administration to recover judgment because of alleged violation of the Emergency Price Control Act of 1942 abate upon the failure of his successor in office to make the showing and take the steps required by the foregoing statute and rules within the designated period of six months after such successor takes office?

Can a successor to the Price Administrator of the Office of Price Administration take and maintain an appeal from judgments and orders of the District Court of the United States in an action brought by such Price Administrator as plaintiff without becoming a party to the action?

IV.

Statement.

A summary statement of the case is presented in the petition, *supra*, so far as material to the consideration of the questions involved, and in the interest of brevity is not again repeated.

V.

Specification of Errors to Be Urged.

The court below erred:

1. In holding that compliance with Rule 25(d) of the Federal Rules of Civil Procedure was not required upon the resignation of a Price Administrator, who had brought an action as plaintiff to recover damages for alleged violations of the Emergency Price Control Act of 1942, and

the appointment of his successor who had assumed the office.

2. In vacating the order of the District Court sustaining petitioners' motion for abatement and dismissal and dismissing the action.

3. In sustaining the motion of the United States of America to be substituted as a party in this action.

4. In assuming jurisdiction of an appeal taken by Philip B. Fleming, Temporary Controls Administrator, who had never become a party to the action.

5. In denying petitioners' motion to dismiss the appeal.

ARGUMENT.

I.

Conflict with Tenth Circuit Court of Appeals on same matter.

The decision of the Court of Appeals conflicts with that of the Tenth Circuit Court of Appeals in *State of Oklahoma ex rel. McVey, County Attorney,* v. *Magnolia Petroleum Company,* 114 F. (2d) 111, 115. In that case the Tenth Circuit affirmed the District Court's dismissal for failure to comply with Rule 25(d) of the Federal Rules of Civil Procedure (28 U. S. C. A. foll. par. 723(c)).[1]

The case was originally entitled "State of Oklahoma, *ex rel.* Bill Vassar, County Attorney for Lincoln County, Oklahoma, versus Magnolia Petroleum Company, a corporation, and P. E. Harolson, defendants."

The complaint alleged that because the Petroleum Company was holding certain lands in violation of the laws and Constitution of the State that title thereto should be vested in the State and the lands should be escheated to it. The prayer demanded a writ of possession on behalf of the State of Oklahoma, that the lands be escheated to the

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[1]Rule 25 (d) provides:
"PUBLIC OFFICERS; Death or Separation From Office. When an officer of the United States, the District of Columbia, a state, county, city or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, #11 (43 Stat. 941) U. S. C. Title 28, #780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

State, sold as provided by law, and the net proceeds paid over to the State Treasurer.

Defendants' motion to dismiss was granted by the District Court on the grounds that Vassar's term of office had expired and that more than six months had elapsed since his successor, Frank McVey, had taken office without substitution of McVey as plaintiff as required by Rule 25(d).

Speaking of the application of Rule 25(d) in that case, the Tenth Circuit said:

> "As to the wording of Rule 25(d) and the language of the Act of February 13, 1925 (Sec. 780, Title 28, U. S. C. A.), the latter refers to actions 'brought by or against' an officer while the former makes references to such officer as is 'a party to an action.' In the application of the rule in the instant case the relator as such officer (County Attorney of Lincoln County) is such 'a party.' * * * Whether the appeal be dismissed in this court as moved, or jurisdiction thereof retained, the action of the lower court in dismissing the action without prejudice to the appropriate commencement of another cause of action should not be disturbed, but remain as if affirmed."

Thus it is obvious that the Tenth Circuit has held that Rule 25(d) applies in a case brought by a public officer even though the action be not personal in character and the officer a nominal party only who brings the suit on behalf of and for the benefit of the real party in interest.

This decision is in hopeless conflict with the decision of the Eighth Circuit in the instant case where it is held that Rule 25(d) does not apply to actions brought by public officers on behalf of the Government. Specifically, the Eighth Circuit said:

> "We think that Rule 25(d) is no broader than the reason for it and that this action may still be main-

> tained notwithstanding the failure of Bowles' successors to comply with the rule. The Price Administrator was authorized by Section 205(e) of the Emergency Control Act to bring the action on behalf of the United States. He was not authorized to bring it on his own behalf * * *. The action was, however, in substance and reality at all times a controversy between the Government and appellees."

But the Oklahoma action was likewise brought on behalf of the State and the complaint expressly stated so in these words:

> "That this action is instituted by Bill Vassar, County Attorney as aforesaid, on behalf of the people of the State of Oklahoma to escheat said lands * * *."

The prayer runs "on behalf of the State of Oklahoma" and asks that the net proceeds be paid over to the Treasurer of the State of Oklahoma.

It was unnecessary to labor the point of conflict between these decisions. We do, however, point out that among the several opinions dealing with this exact point involving actions for alleged violation of the Emergency Price Control Act, at least two United States courts reaching a contrary conclusion with the instant decision have done so by the authority of the Tenth Circuit case. *Bowles* v. *Ohlhausen,* 71 F. Supp. 199; *Bowles* v. *Siegel,* 7. F. R. D. 331, 332, 333.

It is also interesting to note that during the argument of the Oklahoma case in the District Court the identical contention was unsuccessfully made by plaintiff that has been successfully made in the instant case by the Government. At 29 F. Supp. 968, l. c. 969, 970, the District Judge said:

> "It is the contention of plaintiff that Vassar was merely a nominal party and that the real party in interest was the State of Oklahoma * * * (l. c. 970).

> The language of the rule (25(d)) and the language of the statute (Title 28, Sec. 780, U. S. C. A.) are clear and easily understood and while the enforcement of a rule may work a hardship upon the plaintiff, nevertheless these rules were adopted to be followed by the courts. They are mandatory and the court deems it its duty to follow the rules as reasonably construed."

It is submitted that the two circuits are in irreconcilable conflict.

II.

Conflict with applicable decision of this Court.

The decision below is definitely in conflict with the decision of this Court in *Fix, Collector,* v. *Philadelphia Barge Company,* 290 U. S. 530, 78 L. Ed. 481, 54 S. C. 270-271, in that the Eighth Circuit has failed to observe the distinction between the action and the cause of action, as pointed out in the Fix case. In that case, which was a decision under a substitution statute, this Court said:

> "There is a clear difference between the action and the cause of action. Revival of the action is necessary because that does not survive the death or resignation of the officer by or against whom it has been brought; but the cause of action may survive, depending on its nature and the applicable rule."

In thus speaking of a cause of action which would survive, the Court surely referred to actions which were not personal in character, those brought on behalf of the Government or which belonged to the office. Revival of even those specific actions are necessary, so it is said, because the action does not survive the resignation of the officer by whom it is brought.

But the Eighth Circuit in the instant case has held that such actions are unaffected by resignation of the officer by whom they have been brought.

The Eighth Circuit held that where the "cause of action" survived (i. e., one not personal in character) the "cause of action" did not abate and that Rule 25(d) therefore did not apply. As long as the Eighth Circuit confined its ruling to the proposition that a "cause of action" brought by a public officer which is not personal in character does not abate upon his resignation, there was no conflict.

When the court went further, as it did in the instant case, and held that the specific action brought by the officer did not abate upon and was unaffected by his resignation then the decision became plainly in conflict with the Fix decision which held that "failure to comply with the statute forecloses the particular remedy therein provided." The remedy provided by the statute of Rule 25(d) is, of course, the continuance or maintenance of the specific action by a successor in office.

While it seems plain that the Fix case held as we have stated, any doubt thereon is instantly dispelled by Supreme Court Rule 19(4), which reads as follows:

> "Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a Federal Court, either of the first instance or appellate, the matter of abatement and substitution is covered by Section 11 of the Act of February 13, 1925 (Title 28, 780 U. S. C. A.). Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office."

Thus, this Court has said as plainly as it could that a specific action brought by a public officer abates upon

the resignation of the officer unless the substitution procedure is complied with.

The Fix case was called to the attention of the Eighth Circuit in the case at bar, both in the brief and the motion for rehearing. The instant opinion does not attempt to distinguish the two opinions, nor does it even mention the Fix case. It is significant that the Tenth Circuit in the Oklahoma case reached its conflicting decision on the sole authority of the Fix case and its application to Rule 25(d).

The instant decision also conflicts with the decision of this Court in *Fleming* v. *Mohawk Wrecking & Lumber Company,* 331 U. S. 111, 67 S. C. 1129, which holds that Rule 25(d) applies to suits brought by a Price Administrator who resigns from office during the pendency of the action. In that case this Court said:

> "The rule (25(d)) requires a showing of substantial need for continuing and maintaining the action."

The provision of Rule 25(d) requiring a showing by the successor in office of a plaintiff-officer of substantial need for continuing and maintaining the action is a wise and just one. A glance at the present complaint shows it. "In the *judgment* of the Price Administrator (then Bowles), the defendants herein have engaged in acts and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 and Amendments thereto * * *."

The reason for this requirement cannot be stated more clearly and logically than was done by the District Judge in *Bowles* v. *Siegel,* 7 F. R. D. 331, l. c. 332, 333. There a decision was reached contrary to the Eighth Circuit opinion in the instant case. In answer to a contention that the action did not abate because at all times the Government

was the real party in interest (what the Eighth Circuit held) the court said (l. c. 332):

> "Whatever may have been the occasion for the original act, out of which the subsequent act and the present rule developed, the language employed in said statutes (Sec. 780, Title 28 U. S. C. A.) and the rule (25(d)) expressly applies to an action which 'may be continued and maintained by * * * his successor.' It seems clear that, when an officer of the Government institutes an action relating to his duties as such officer, his successor is charged with the responsibility of determining whether or not such action should be continued, and if he so determines, it is his duty to make the showing required by the rule so that he may be substituted and may continue the action, and that, if he does not do so, the action cannot be continued and maintained.
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> * * * * * * *
>
> (l. c. 333) The Supreme Court in the recent cases of *Fleming* v. *Mowhawk Wrecking & Lumber Company*, 331 U. S. 111, 67 S. C., 1129, * * * stated: 'The rule requires a showing' of substantial need 'for continuing and maintaining the action.'
>
> This clearly negatives the contention of opponents of the present motion that no substitution under the rule is necessary * * *."

That decision was appealed by the United States of America under a claim that it had the right to do so as the real party in interest without becoming a party to the case. As we later point out in this argument, the appeal was dismissed by the United States Court of Appeals for the District of Columbia. (*United States* v. *Siegel*, not yet reported.)

It is clear, however, that if one portion of Rule 25(d) applies to an action brought by a Price Administrator

(as held by this Court in the Mohawk case), then the entire rule applies. Consequently, the instant decision is in conflict with the decision of this Court in that case.

III.

Because the Eighth Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

This point involves the Circuit Court's denial of petitioners' motion to dismiss the appeal, the granting of the motion to substitute the United States of America, and the order of substitution thereon. The last two acts of the Circuit Court of Appeals has changed the title of the within action so that the United States of America has now been designated as appellant. The original record on appeal was entitled "Philip B. Fleming, Temporary Controls Administrator, appellant, vs. Ben E. Goodwin and M. R. Goodwin, doing business as Ben E. Goodwin Company, appellees."

To properly understand the above mentioned point, a statement must be made of the background of this strange proceeding. It is difficult to imagine a more unusual departure from the accepted course of judicial proceedings than that disclosed by the instant record.

Nothwithstanding the pendency of a prior action in the same court against petitioners by Bowles as Price Administrator in which it was alleged that petitioners had violated both the injunction section and the damage section of the Emergency Price Control Act of 1942, this case was filed by said Bowles as Price Administrator involving the same transactions and the same time.

Upon the succession of Paul A. Porter to the office of Price Administration, *vice* Bowles, resigned, the said Porter filed his motion to be substituted as plaintiff in the

District Court on the 23rd day of August, 1946. In that motion Porter claimed to have taken office on the 19th day of March, 1946 (R. 4, 5). This motion was granted by the District Judge upon Porter's showing of its timeliness under Rule 25(d), Porter representing that he had taken office on the said 19th day of March, 1946 (R. 37). Thereafter, Porter admitted the falsity of such representation and admitted that he actually took office on February 26, 1946 (R. 48), whereupon the District Court set aside the order of substitution on the grounds of falsity of testimony and misrepresentation by the Office of Price Administration (R. 51, 52).

Petitioners' motions for abatement and to dismiss for failure to comply with Rule 25(d) having been restored to the docket for decision, the same were sustained and the action was dismissed since it appeared under the admitted facts that there was no substitution made within six months after Porter took office (R. 52, 53). On the same date the District Court denied Porter's motion to substitute.

The appeal heard by the Eighth Circuit Court of Appeals was taken from these orders denying Porter's motion for substitution and sustaining petitioners' motion to abate and dismiss the action (R. 55-56).

On the 29th day of January, 1947, one Philip B. Fleming, Temporary Controls Administrator, purported to appeal to the Eighth Circuit Court from such orders and judgment. In his notice of appeal Fleming stated that he filed same in lieu of Paul A. Porter, who had resigned, because of the action of the District Court in overruling Fleming's motion to be substituted as party plaintiff in place of Porter (R. 55-56).

The last statement was not true. The District Court had not overruled Fleming's motion to be substituted.

Fleming had filed such a motion on the 20th day of January, 1947, asking to be substituted in place of Porter "pursuant to Rule 25(d) of the Rules of Civil Procedure for the District Courts of the United States" (R. 53, 54). That motion was argued before the District Judge by counsel for both parties, after which the District Court took the motion under advisement (Supp. R. 7).

Less than a week later, and before the court rendered its decision on his motion to substitute, Fleming filed his notice of appeal to the Eighth Circuit Court of Appeals in which he falsely stated that his motion to substitute had been denied. Consequently, Fleming was not a party to the record, had no right of appeal, and the case was never properly before the Eighth Circuit Court.

In assuming jurisdiction where none existed; in reversing the orders and judgment of the District Court; in granting the motion of the United States of America for substitution as party plaintiff, the Eighth Circuit Court of Appeals took jurisdiction in an appeal unauthorized by law. Therefore it departed from the accepted and usual course of judicial proceedings.

In view of what appears to have been a deliberate, calculated attempt to mislead by concealing from the record the pendency of his motion to substitute as plaintiff, Fleming must have considered the validity of his appeal to be very doubtful. That portion of the record showing reservation of ruling by the District Judge was omitted from the record on appeal and was only brought up by supplemental transcript upon the insistence of petitioners (Sup. R. 7-8, Cir. R. 16, Fol. 21).

Petitioners at all times objected to the appeal by Fleming and contested same in their motion to dismiss the appeal (8 Cir. R. 9, 10).

Notwithstanding the former language of the Eighth Circuit Court of Appeals in *Taylor* v. *Logan Trust Co.*, 289 F. 51, l. c. 53:

> "The orders • • • were not subject to review at the instance of appellants, who were not parties to the foreclosure suit. Strangers to a suit are not entitled to take appeals from the orders and judgment entered therein."

the Circuit Court overruled petitioners' motion to dismiss without comment (8 Cir. R. 29).

The United States Court of Appeals for the District of Columbia took an entirely different view of a similar situation and rendered a contrary decision on the 9th day of February, 1948, in the case of *United States* v. *Siegel*, not yet reported. As we have before said, that case was a purported appeal from the District Court's dismissal of an action for alleged violation of the Emergency Price Control Act of 1942. The District Judge held that the action had abated upon the non-compliance of Rule 25(d) by the successor in office of the plaintiff and dismissed the cause. The Government had contended that since the United States of America was always the real party in interest that the rule did not apply. After the dismissal in the District Court the United States, without becoming a party plaintiff, filed notice of appeal, just as Fleming did in the instant case. In the United States Court of Appeals for the District of Columbia, that appeal was dismissed upon motion of the appellees. That is precisely what the Eighth Circuit Court of Appeals refused to do in the case at bar. In dismissing the appeal the District of Columbia Court of Appeals held that even the real party in interest could not appeal without being made a party before attempting to appeal. In so ruling that court followed and was guided by the decisions of this Court in

South Carolina v. *Wesley*, 155 U. S. 542, 15 Sup. Ct. 230, and *United States ex rel. Louisiana* v. *Boarman*, 244 U. S. 397, 37 Sup. Ct. 605, l. c. 607.

In the last mentioned case this Court said:

> "To the seemingly insurmountable barrier to the claims of the petitioner presented by this Supreme Court decision, we must add that the state was not at any time a party to this record, and that its first application for leave to intervene and to appeal was long after the term at which the decree of dismissal was rendered, and within a few days of the expiration of the time within which even 'a real party in interest' would have been allowed an appeal."

And *In Ex Parte: In the Matter of the Application of the Leaf Tobacco Board of Trade*, 222 U. S. 587, 32 Sup. Ct. 833, it was announced in a *per curiam* opinion by this Court, as a subject no longer open to discussion, that "one who is not a party to a record and judgment is not entitled to appeal therefrom."

We earnestly submit that this Court's power of supervision should be exercised because the Eighth Circuit departed from the accepted and usual course of judicial proceedings.

IV.

The Eighth Circuit Court of Appeals has decided an important question of Federal law which should be settled by the Supreme Court.

This Court has granted certiorari in substitution cases in at least two instances. See *Fix, Collector*, v. *Philadelphia Barge Company, supra*, and *Fleming* v. *Mohawk Wrecking and Lumber Company, supra*. The subject matter is therefore of sufficient importance to justify the writ should the circumstances require.

It is apparent from our reference to several Federal decisions that the substitution procedure, as far as it is affected by suits brought by public officers who have resigned, is vexing our courts throughout the land. It is true that some decisions involving different but related situations have announced principles somewhat similar to those applied by the instant opinion. As shown by our citations, the decisions are not uniform. This troublesome question should be settled by an authoritative decision of the Supreme Court.

Since our name appeared in the Federal Supplement as counsel for defendants, we have received many requests for information from counsel facing similar proceedings. These letters have originated in the States of Michigan, New York, New Jersey, Wisconsin and Texas. Both the bench and bar will welcome a decision from this Court.

In view of the modern trend as evidenced by the adoption of Federal Rules of Civil Procedure and the Rules of Criminal Procedure, the need of uniform procedure may be assumed. Doubtless the Congress, when it enacted the Act of February 13, 1925, thought it had eliminated all of the existing inconvenience and confusion with respect to the removal of a public officer from office during the pendency of litigation to which he was a party. Regardless of the reason for the Act, the Congress had the right and did exercise its privilege to enact a rule to apply to all such cases. The language is simple and plain, the remedy convenient and unburdensome.

Here it is appropriate to point out that the instant opinion held that the original Act could be no broader than the reason for it. In the Fix case, *supra,* this Court said that the purpose of the Act was to provide a method by which a party bringing a suit *against a public officer* would be able to substitute a successor in office as a party defendant. The Act, however, went further and included

actions brought by or against public officers. Rule 25(d) applies to public officers who are parties to an action. The Eighth Circuit, therefore, has repealed that portion of the rule applying to cases where the public officer is a plaintiff and has limited its scope to such actions as have been brought against an officer who later ceases to hold office.

The Supreme Court of the United States, by its Rule 19(4), sought to make certain that all understood the universality and scope of the substitution procedure. Rule 25(d), differing from the Act only in making the six months' period begin to run from the taking office of the successor, is as simple, convenient and inclusive as the former Act.

Recently an unauthorized, illogical procedure has been widely advanced in the Federal courts, a procedure which is fraught with possibilities of confusion and chaos. The original introduction of the "real party in interest theory" may have seemed harmless at the time and regarded as justifiable in view of some person's neglect or carelessness, but the theory was always illogical and calculated to lead to confusion.

This is borne out by the cases where its extension has been approved. Even the present opinion is compelled to make apologetic statements, such as that Porter and Fleming assumed that compliance was required; that ordinarily the Circuit Court would not consider a question not presented or passed on by the District Court; and that the District Court could not be justifiably criticized for dismissing the case.

The widespread concurrent appearance of the "real party in interest" theory in such diverse localities would indicate an organized effort to extend the doctrine's scope. The most preposterous instance is found in the appeal

from the decision in the case of *Bowles* v. *Siegel, supra*. In that case the Government, without moving for substitution as plaintiff, thrust itself into the case by filing an appeal from the order of dismissal in the District Court. The United States Court of Appeals for the District of Columbia, in the case of *United States* v. *Siegel*, rendered February 9, 1948 (not yet published), held that the "real party in interest" theory could not justify such procedure.

Thus we have the unedifying spectacle throughout the Federal system of confusion and conflict upon an important topic. How long this confusion will continue cannot be foretold. The emergence of governmental officers as prolific litigants does not seem to be diminishing. The apparent reluctance of some opinions, including the one in the instant case, to harmonize their decisions with this Court's opinion in the Fix case and the decision of the Tenth Circuit in the Oklahoma case has not clarified the situation. To let such confusion stand in the face of the plain scope of Rule 25(d), the Supreme Court Rule 19(4), the Fix case, and the Oklahoma case, is to give the clock's hand a backward turn.

Respectfully submitted,

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CITATIONS

CASES:

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 724

BEN E. GOODWIN and M. R. GOODWIN, doing business as BEN E. GOODWIN COMPANY,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (C. C. A. R.[1] 23-29) is reported at 165 F. 2d 334. The

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[1] The record consists of three parts, which have not been paginated consecutively. The record of proceedings in the district court originally filed in the circuit court of appeals will be referred to as "R."; the supplemental record of proceedings in the district court will be designated "Supp. R."; and the record of proceedings in the circuit court of appeals will be designated "C. C. A. R."

opinion of the district court (R. 61-64) is reported at 68 F. Supp. 949.

JURISDICTION

The judgment of the circuit court of appeals was entered January 16, 1948 (C. C. A. R. 30), and a petition for rehearing (C. C. A. R. 31-37) was denied February 17, 1948 (C. C. A. R. 39). The petition for a writ of certiorari was filed April 7, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a treble damage action instituted under Section 205(e) of the Emergency Price Control Act in the name of Chester Bowles, Price Administrator, may now be continued in the name of the United States.

2. Whether Philip B. Fleming, Temporary Controls Administrator, successor in office to the Price Administrator under the Emergency Price Control Act, had standing to appeal from the district court's dismissal of the action, where Fleming had moved to be substituted as plaintiff in the district court, but his motion had not been acted upon before the appeal was noticed.

RULE INVOLVED

Rule 25(d), Federal Rules of Civil Procedure, provides:

> (d) *Public Officers: Death or Separation From Office.*—When an officer of the United

States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

STATEMENT

In September 1945, Chester Bowles, then Price Administrator, instituted on behalf of the United States a treble damage action against petitioners under the Emergency Price Control Act (R. 1-2). A motion to substitute Paul A. Porter in place of Bowles was filed on August 23, 1946, and noticed for hearing on August 28, 1946 (R. 4-5). This motion recited that Bowles had resigned as Price Administrator and that Porter had been sworn in as his successor on March 19, 1946. On August 30,

1946, the court granted the motion (R. 37-42). On October 1, 1946, however, Porter advised the court that in fact he had taken his oath of office as Price Administrator on February 26, 1946, and suggested that the order granting substitution, issued on the erroneous factual allegation, be withdrawn (R. 48-49). The order was set aside on October 2, 1946 (R. 51-52). On November 1, 1946, an order (R. 52-53) and accompanying memorandum opinion (R. 61-64) were entered denying substitution of Porter for Bowles and granting petitioners' motion for abatement and dismissal of the action, which had been filed on September 9, 1946 (R. 44-45). On December 12, 1946, the Office of Price Administration was abolished and its functions under the Act were transferred to the Office of Temporary Controls by Executive Order No. 9809,[2] and Philip B. Fleming took office as Temporary Controls Administrator. On January 20, 1947, Fleming moved to be substituted as plaintiff in place of Porter (R. 53-54). This motion was heard on January 24, 1947, and the court reserved ruling on it (Supp. R. 7). On January 29, 1947, Fleming filed a notice of appeal from the order of November 1, 1946, denying substitution of Porter and dismissing the action (R. 55-56).

Executive Order No. 9841,[3] issued April 23, 1947, provided for the termination of the Office of Temporary Controls. Executive Order No. 9842[4] was

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[2] 11 F. R. 14281.
[3] 12 F. R. 2645.
[4] 12 F. R. 2646.

issued also on April 23, 1947, and provided that as of June 1, 1947:

> The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend: * * *
>
> (b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control; * * *.

On June 18, 1947, the Government moved in the circuit court of appeals for the substitution of the United States as appellant (C. C. A. R. 5-6). Petitioners moved to dismiss the appeal on June 20, 1947 (C. C. A. R. 6-10), and on June 23, 1947, filed objections to the substitution of the United States as appellant (C. C. A. R. 11-16). On January 16, 1948, the circuit court of appeals granted the Government's motion for substitution of the United States, denied petitioners' motion to dismiss the appeal (C. C. A. R. 29), and entered judgment vacating the order of the district court appealed from and remanding the case for trial on the merits (C. C. A. R. 30). In its opinion (C. C. A. R. 23-29), the court below held that Rule 25(d) of the Federal Rules of Civil Procedure did not require abatement of the action on the resignation of Bowles, and that substitution of the United States as appellant was merely a formal matter "to keep the record straight."

ARGUMENT

1. We believe that Rule 25(d) of the Federal Rules of Civil Procedure, providing for the substitution of successor government officers,[5] does not apply in the present case, since the question here presented is not one of substituting a successor in office, but rather is whether an action commenced pursuant to statutory authority in the name of a government officer on behalf of the United States may be continued in the name of the United States. Section 205(e) of the Emergency Price Control Act permits (*Porter* v. *Pure Oil Co.*, 7 F. R. D. 577, 579 (E. D. Pa), reprinted C. C. A. R. 19-21) the Price Administrator to bring treble damage actions "on behalf of the United States." A right of action vested in the Administrator under the Act is a right of the United States, which may be asserted by the United States. Cf. *United States* v. *Summerlin,* 310 U. S. 414, 416. Since an action so brought in the name of the Administrator is actually a suit by the United States as the real party in interest (*Porter* v. *Maule,* 160 F. 2d 1, 3 (C. C. A. 5); *United States* v. *Saunders Petroleum Co., Inc.,* 7 F. R. D. 608 (W. D. Mo.); *Bowles* v. *Ell-Carr*

[5] It is not entirely clear whether technically Rule 25(d) of the Federal Rules of Civil Procedure or Rule 19(4) of the Rules of this Court, incorporating Section 11 of the Act of February 13, 1925 (c. 229, 43 Stat. 941, 28 U. S. C. 780), is the relevant provision. Since this Court in *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 119, referred only to Rule 25(d), we have assumed throughout this brief that this is the governing provision. We believe there is no difference between that rule and the statute so far as the present case is concerned.

Co., Inc., 71 Supp. 482 (S. D. N. Y.)),[6] permitting it to continue in the name of the United States "is not technically a matter of making a new party at all." *United States* v. *Koike*, 164 F. 2d 155, 157 (C. C. A. 9). Cf. *Porter* v. *Pure Oil Co., supra; Bowles* v. *Goldman*, 7 F. R. D. 12 (W. D. Pa.); *Porter* v. *American Distilling Co.*, 71 F. Supp. 483, 488 (S. D. N. Y.) *Porter* v. *Steger*, 74 F. Supp. 109 (D. Md.) We submit that the court below correctly ruled that since the present action was "in substance and reality, at all times a controversy between the Government and the appellees," Rule 25(d) is not applicable, and that the substitution of the United States as party plaintiff "amounts to nothing more than a formal amendment to the title of the action to conform it to the truth." (C. C. A., R. 28.)

2. The district court was in error in holding (R. 62-63) that the action abated under 28 U. S. C. 780 and Rule 25(d) of the Rules of Civil Procedure because no showing of substantial need to continue the action in the name of Porter was made within six months after Porter succeeded Bowles as Price

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[6] In *Bowles* v. *Ohlhausen*, 71 F. Supp. 199, 200 (N. D. Ill.), one of the two cases cited by petitioners (Pet. 14) as contrary to the decision below, the court accepted the Government's position that the United States is the real party in interest. It held, however, that Rule 25(d) applies to treble damage suits brought by the Administrator. The *Ohlhausen* case, which is now pending on appeal in the Circuit Court of Appeals for the Seventh Circuit (No. 9435), is distinguishable from the present case in that there the motion to substitute Porter was not made within six months after he succeeded Bowles. See Point 2, *infra*.

Administrator.[7] Porter succeeded Bowles on February 26, 1946 (R. 50). Thus, under Rule 25(d), substitution was proper if a showing of substantial need to continue the action in the name of Porter had been made at any time through August 26, 1946, The motion for substution was filed with the court on August 23, 1946. In *Fleming* v. *Mohawk Co., supra,* 331 U. S. at 119, this Court held that the provisions of the Emergency Price Control Act themselves showed "substantial need" for continuing actions for enforcement of administrative subpoenas because rights and liabilities accruing during price control were not wiped out by the termination of the Act. *Cf. Porter* v. *American National Bank & Trust Co.,* 161 F. 2d 504 (C. C. A. 7). *A fortiori* there is substantial need for continuing a treble damage action commenced prior to the expiration of the Act. *United States* v. *Koike, supra; Porter* v. *American Distilling Co., supra; Porter* v. *Bowers,* 70 F. Supp. 751, 758 (W. D. Mo.). Thus, the showing of substantial need was made in this case by the filing of the motion, which

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[7] The circuit court of appeals held that Rule 25(d) did not apply at any stage of the proceedings (C. C. A. R. 25-28). While we believe that the court was right in this respect, there is no occasion to give consideration to this point since there was, we submit, full compliance with the rule.

Fix v. *Philadelphia Barge Co.,* 290 U. S. 530; *Fleming* v. *Mohawk Co., supra;* and *State of Oklahoma ex rel. McVey* v. *Magnolia Petroleum Company,* 114 F. 2d 111 (C. C. A. 10) (Pet. 6-7, 12-13, 15, 17), are relevant only to the question of the applicability of Rule 25(d). It is, therefore, unnecessary to discuss them here. We think however, that they are all distinguishable from the instant case and do not support petitioners' conclusion.

was done on August 23, 1946, within six months after Porter took office. The district court ruled that because of Rule 6(d), "no action could be taken nor showing made until five days after the filing of said motion" (R. 62). Rule 6(d) provides:

> A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, * * *.

However, it has consistently been held that motions by government officers for substitution under Rule 25(d) may be heard *ex parte. Bowles* v. *Weiner,* 6 F. R. D. 540 (E. D. Mich.); *Bowles* v. *Goldman, supra; Porter* v. *Woodruff,* 7 F. R. D. 391 (W. D. N. Y.); *In re Creedon,* 7 F. R. D. 546 (W. D. N. Y.); *Bowles* v. *Blue Ribbon Provisions,* 7 F. R. D. 603 (E. D. N. Y.); *Bowles* v. *Kent County Motor Co.,* 6 F. R. D. 515, 516 (D. Del.).[8] In the case last cited, the court expressed the opinion that the district court in the present case (*Porter* v. *Goodwin,* 68 F. Supp. 949; R. 62) was in error in "impliedly holding that Rule 6(d) cuts down by five days the six months' period for making the substitution."

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[8] These cases reach this result on the basis of the express language of Rule 25(d), which requires notice only to "the party or officer to be affected." See *Bowles* v. *Weiner, supra,* 6 F. R. D. at 542: "It is therefore the successor-officer who is the party affected and to whom notice is required to be given, and not the opposite party. * * * the defendants are in no manner affected by the substitution of parties plaintiff in this case, and * * * they have not been in any manner prejudiced thereby."

In entering final judgment in *Bowles* v. *Babar*, 54 F. Supp. 453, 455 (E. D. Mich.), the court on its own motion substituted Chester Bowles for Prentiss Brown as Price Administrator "for orderliness of this record." In several federal districts general orders of substitution in actions under the Emergency Price Control Act have been issued. Cf. *Bowles* v. *Weiner, supra; Bowles* v. *Goldman, supra; In re Creedon, supra; Porter* v. *Sands*, 74 F. Supp. 494 (E. D. N. Y.).

Fleming's motion for substitution was made within two months after he assumed office.[9]

Bowles v. *Seigel*, 7 F. R. D. 331 (D. D. C.)[10] and *Bowles* v. *Ohlhausen, supra*, the only cases cited by petitioners as directly contrary to the decision of the court below (Pet. 14), are clearly distinguishable from the instant case, in that in neither of those cases was a motion for substitution made within six months after the successor Price Administer took office.

3. Petitioners' contention (Pet. 5, 19-23) that the appeal should have been dismissed because taken in the name of Fleming, who had not been

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[9] Clearly Rule 25(d) could have no applicability to the substitution of the United States as nominal party plaintiff. See Point 1, *supra*. In any event, it should be observed that the motion to "substitute" the United States was made within three weeks after the effective date of Executive Order 9842.

[10] In connection with the *Seigel* case, it should be noted that the court of appeals dismissed the appeal on other grounds (see *infra*, Point 3), expressly refraining from passing on the applicability of Rule 25(d). *United States* v. *Seigel*, App. D. C., No. 9616, not yet reported.

made a party of record, is manifestly without substance. The present action had been commenced in the name of Price Administrator Bowles. The subsequent motion to substitute Porter for Bowles was denied and the case dismissed on November 1, 1946. Before the time for appeal had expired, Porter ceased to hold the office and Fleming succeeded to the position. A motion was made to substitute Fleming, who had succeeded to Porter's right to sue on behalf of the Government. This motion was heard on January 24, 1947 (R. 53-55), and the court reserved decision thereon (Supp. R. 7). The appeal was filed on January 29, 1947. As expiration of the time for filing a notice of appeal from the order dismissing the action approached, the Government obviously was in a dilemma. The alternative possibilities were to file the appeal in the name of Bowles, Porter, Fleming, or the United States. Neither Bowles nor Porter at that time had any interest, nominal or real, in the action; technically, neither of them was any longer authorized to represent the Government in litigation. Although we believe the appeal could have been filed in the name of the United States, since it was the real party in interest, it had been the uniform practice to bring actions under Section 205 of the Act in the name of the Administrator "for purposes of identification and classification." *Porter* v. *Pure Oil Co., supra,* 7 F. R. D. at 579. There appeared to be no reason to change the practice in this case. Fleming was at the time the duly authorized Government agent to prosecute such litiga-

tion. Although a failure to move for substitution of Fleming in the district court would not have invalidated an appeal taken in the name of Bowles or Porter (*Porter* v. *Maule, supra*, 160 F. 2d at 3),[11] there appears to be no possible ground for arguing that the appeal was required to be prosecuted in the name of a person who no longer held the office. If petitioners were correct in their objection to the allowance of an appeal in the name of Fleming and to the substitution of the United States (Pet. 5, 11), the result would be either that the appeal had to be prosecuted in the name of a person having no interest or, what is equally untenable, that no appeal from the dismissal could be filed. Cf. *Porter* v. *Pure Oil Co., supra.*

United States v. *Seigel, supra,* relied on by petitioners (Pet. 22), does not support their position. In that case a complaint was filed in the name of Chester Bowles, Price Administrator. No motions were made to substitute either Porter or Fleming. On April 18, 1947, the defendant moved to dismiss for failure to substitute under Rule 25(d) and 28 U. S. C. 780. Judgment dismissing the complaint was entered on July 10, 1947. A notice of appeal was filed by "the United States, the real party in interest," although the United States had not moved to be substituted as plaintiff. In dismissing the appeal on the ground that the United States had no standing to appeal, the court of appeals emphasized that the United States "never made

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[11] Cf. *Bragg* v. *Gerstel*, 148 F. 2d 757 (C. C. A. 5).

any attempt to become a party" in the district court.[12] In the present case both Fleming and his predecessor did attempt to become parties and the court in the *Seigel* case distinguished the instant case on that ground.

The other cases cited by petitioners (Pet. 22-23) are clearly distinguishable from the instant case. In *Taylor* v. *Logan Trust Co.*, 289 Fed. 51 (C. C. A. 8), appellants moved for leave to intervene as third parties in the district court, but did not appeal from the denial of intervention. In the present case Fleming did not seek to intervene as a third party, but rather sought to be substituted as plaintiff. Further, within the proper time he followed the only apparent avenue of appealing from the action of the district court.

In *Louisiana* v. *Jack*, 244 U. S. 397, cited by petitioners (Pet. 23), the State of Louisiana attempted to appeal from a judgment confirming a settlement of an action by a state levee board. The Louisiana Supreme Court had previously held that under Louisiana statutes all title to the land involved and all right to sue and be sued in connection therewith had been vested in the levee board, there was no coordinate power in the governor or attorney general, and that, therefore, under Louisiana law, there was no power to institute a suit in

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[12] We believe the *Seigel* decision to be wrong. It is our opinion that since the United States was always the real party in interest, it had the right at any time to appear as plaintiff without having to move for substitution. This was the view taken in the dissenting opinion of Judge Edgerton in the *Seigel* case.

the name of the State. This Court felt itself bound by the Louisiana court's construction of the applicable state law. The Court reaffirmed its prior holdings that an appeal may be taken only by one who is "a party or privy to the record." (p. 402). Certainly Fleming and the United States were at least privies in the present action.

In *South Carolina* v. *Wesley,* 155 U. S. 542 (see Pet. 23), the State of South Carolina had sought to have the lower court set aside a judgment in a case to which it had not been a party. The state in that case had expressly refused to submit its rights to the jurisdiction of the court, and did not complain that it was refused leave to intervene. In the instant case Fleming sought to be made a party of record, and submitted the Government's claim to the jurisdiction of the court.

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578 (see Pet. 23), is entirely inapposite. It involved the right of persons having at most a general, indirect interest in a proceeding to invoke mandamus in this Court to compel the circuit court to admit petitioner as a party for the purpose of making the circuit court obey a mandate previously issued by this Court.

CONCLUSION

The decision below is correct and the petition for a writ of certiorari presents no question warranting further review by this Court. The petition should, therefore, be denied.

Respectfully submitted,

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